

OGC 70-1436

OGC Has Reviewed

20 August 1970

MEMORANDUM FOR: Chief, Support Branch, OEL

SUBJECT: Legal Implications of Copying Sports
Telecasts for Showing to Employees
at Special Posts Abroad

1. The attached is a memorandum discussing the copyright aspects of copying sports telecasts. It is our conclusion that the legal risks are rather minimal. Certainly the penalties are de minimis. Therefore, the judgment of whether to put these on tapes becomes a policy judgment. If the decision were made to copy these tapes, strict control should be maintained over the actual tapes so there would be continuing accountability and, presumably, eventual destruction.

2. You will also note in the attached memorandum there are other ways to approach the problem. I would think a direct approach by our [] is possibly not the best. However, I see no reason why [] could not be in touch with his contact, [] in the Armed Forces Information Service. I will leave these judgment and negotiations to your people if you feel this is the way you would like to go.

[]
Deputy General Counsel

Att.

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✓ 1 - OGC Subject - COPYRIGHT

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OGC 70-1419

18 August 1970

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MEMORANDUM FOR:

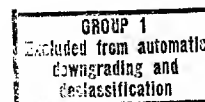
SUBJECT: Legal Implications of Copying Sports
Telecasts for Showing to Employees
at Special Posts Abroad

1. The Agency has a hardship base abroad which is comparatively remote and inaccessible to any centers of culture or entertainment. The responsible division would like to record national telecasts of sports events on video tape to make them available for showing to personnel at the base in an effort to supplement their recreational activities. The legal implications both of recording the programs and of showing them later are of concern.

2. P.L. 86-726 approved 8 September 1960 amends Title 28, Section 1498 of the U.S. Code as follows:

"(b) Hereafter, when the copyright in any work protected under copyright laws of the United States shall be infringed by the United States...the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of Title 17, United States Code....

"(c) The provisions of this section shall not apply to any claim arising in a foreign country."

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Thus, it would appear that the actual showing of video tape at an Agency base in a foreign country would not be actionable in the Court of Claims. The legislative history of this provision reveals that both the Departments of State and Commerce posed objections to the extraterritorial application of the amendment. While it is clear from their submission to the Congress that these Departments were concerned over U. S. Government infringement abroad of foreign patents, the clear wording of paragraph (c) is not so limited. Therefore, if a U. S. copyrighted video tape were shown by the U.S. Government abroad in violation of that copyright, no action would lie by reason of the 1960 act in the Court of Claims.

3. The remaining issue then is whether the making of a video tape of a sports program which has been copyrighted is in itself a violation of federal or local law. Title 17 U.S.C. section 5 classifies works for copyright into 13 categories. Class "m" is "motion pictures other than photoplays" which has been held to include such pictorial representations as newsreels, travelogues, exclusive sports events and since 19 April 1961, video tapes of these representations. Title 17 U.S.C. section 1 states simply:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

* * *

(c) ... to make ... any transcription or record thereof by or from which ... it may ... be exhibited, delivered, presented, produced, or reproduced; ..."

Thus, technically no recording or other taped duplication of a copyrighted work may be made without permission of the copyright owner even if such recording is not intended to be replayed publicly for profit. Nevertheless, practically speaking an individual may record copyrighted material for his own use without fear of suit for copyright infringement. Moreover, recent case law has made it possible for community antenna television companies (CATV) to process

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signals from a number of sources and channel them by lines to individual homes without copyright infringement. The courts have held that the CATV station is an extension of the individual's own TV set and its presentations are therefore not public performances. However, these cases involve instantaneous rebroadcasting from the distant source. (CATV stations apparently do not record programs for delayed broadcasting.) Such recording would require permission of the copyright holder.

4. Assuming a technical violation in taping a copyrighted sports event from television, what action could be taken by the owner of the copyright? 17 U.S.C. 101 states:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) Injunction. --To an injunction restraining such infringement;

"(b) Damages and profits; amount; other remedies. -- To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, ... or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, ... (description of various infringements where the infringer is not aware of the infringement) ... and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty....

* * *

"Second. In the case of any work enumerated in section 5 of this title, ... , \$1 for every infringing copy made or sold by or his agents or employees;

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"(c) Impounding during action

"(d) Destruction of infringing copies"

The copyright holder would be able to receive injunctive relief only if the court had reason to believe the copyright infringement would continue. Shapiro, Bernstein and Co. v. Bleeker, 243 F. Supp. 999 (1965). He might also require impounding and finally destroying any copy of his work. Finally, and most important, he would seek damages.

5. Case law on the subject of damages leads me to the conclusion that a court would either award the minimum statutory amount for damages "in lieu" of "actual damages and profits" or allow the Government to prove that damages were "de minimis". If the court allowed proof of loss to the copyright holder and profit to the Agency, the holding in the Shapiro case would favor judgment for the Agency. The Shapiro case held that where exact proof of profit can be made and where there are no other damages shown for violation of the Copyright Act, there is no need to resort to the provision permitting an award in lieu of actual damages. In that case the defendants' profit for selling a single copy of a work that contained the plaintiff's copyrighted material was 22 cents. The court awarded judgment to the defendant with costs and the sum of \$1500 attorney fees. In reaching its decision, the court cites a U. S. Supreme Court case, Sheldon v. Metro-Goldwyn Corp. (1940), 309 U. S. 390, which held that if either profits or damages are ascertainable, the minimum provided for in the "in lieu" provision need not be resorted to. A 1935 case states that the "in lieu" provision was meant to be the equitable substitute for cases which presented impossibility of proof as to damages and profits. Douglas v. Cunningham (1935), 294 U. S. 207. Thus, in our case the Government as defendant would not have presented the video tape to an audience for profit. Moreover, since the audience is located in a remote area abroad, far from any capability of seeing the program directly, the copyright holder would have lost no potential revenue as a result of the Agency's copying his work. The "de minimis" concept, therefore, should apply. If the court were to read 28 U.S.C. 1498(b) to mean that the owner of the copyright may recover as damages at least "the minimum statutory damages", then recovery would be \$250 for making the single copy and possibly attorney fees.

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6. Finally, this discussion would be incomplete without mentioning cases such as Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (1968). Here the defendants used a number of pictures of the Kennedy assassination, the copyright to which was held by Life magazine. One of the defendants, Josiah Thompson, had written a book on the assassination. Life magazine had purchased from Abraham Zapruder the home movie pictures taken with his camera of the assassination for \$150,000. The same film was used by the Warren Commission in its investigation. Thompson then used some of the film for what the court termed his "serious, thoughtful and impressive analysis". The court applied the doctrine of "fair use", which usually when applied in infringement cases, is meant to allow one to use a portion of a copyrighted work where that used is not substantial and does not destroy the integrity of the work. In this case, however, the court looked to the "public interest in having the fullest information available on the murder of President Kennedy". Applied to the present fact situation, it is just possible that a court would look upon the single copy duplication of a sports event for viewing at an isolated hardship post abroad by a group of Government employees who otherwise would have no opportunity to see these events as "fair use".

7. If the risk of detection and resultant legal action for copyright infringement cannot be taken, the other alternative is to work directly with our graphics people to negotiate with the copyright owners for the rights to copy these sports events. I discussed this general possibility with [] who said he has a regular relationship with the TV networks. He said further, however, that these so-called "exclusive" sports events are usually controlled by some sports league, i. e., the National Football League; he did not appear reluctant to tackle the task if requested.

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8. [] also mentioned the Armed Forces Information Service, which negotiates for all kinds of material to be shipped to servicemen. One such example is the six o'clock news from all three networks which is video taped at the Pentagon and flown to Vietnam. The contact there is [] [] with whom [] has a very close working

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relationship. I asked about cost also. [] said that if the owner or Network supplied the furnished taped product it might run between \$300 - \$500 per program for this limited use. If the Agency taped the program, it would be less of course.

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Assistant General Counsel

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OGC: []

Distribution:

Orig - Subject - COPYRIGHT

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1 - [] Signer

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